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No. 85-5221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL LAMONT GRIFFITH,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Kentucky

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the past 23 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal

problems of minorities and the poor. The Committee's membership today includes past presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance to our system of justice of having criminal verdicts rendered by juries untainted by racial discrimination, and the widespread perception that prosecutors have exercised peremptory challenges in a discriminatory manner, prompted the Lawyers' Committee to file a brief *amicus curiae* in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986). The same concerns have prompted the Lawyers' Committee to file a brief *amicus curiae* in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner Randall Lamont Griffith, a black man, was convicted by a Kentucky state jury of first degree robbery and second degree persistent felony, based upon his alleged theft of a purse (J.A. 2-3, 7-8). He was sentenced to a term of 20 years' imprisonment (J.A. 7-8). Petitioner was tried approximately three months after the trial of James Kirkland Batson, whose conviction was reviewed by this Court last Term (*see Batson v. Kentucky*, 106 S. Ct. 1712 (1986)); both trials were conducted by the same prosecutor (Br. Opp. 1).

At petitioner's trial, the Commonwealth used four peremptory challenges to remove four of the five black

veniremen (J.A. 12-13).[1] The fifth black venireman was excused by the clerk pursuant to a random procedure prescribed by Kentucky Criminal Rule 9.30 (J.A. 15; Pet. 3). Petitioner interposed a timely objection to the Commonwealth's use of its peremptory challenges and moved to discharge the jury (J.A. 10-16). The Commonwealth gave an explanation for having challenged two of the four black veniremen whom it had excused (J.A. 14). The trial court then overruled petitioner's objection and denied his motion (J.A. 14-16).

The Supreme Court of Kentucky affirmed petitioner's conviction (J.A. 17-18). Ostensibly based on this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), the Kentucky Supreme Court rejected petitioner's Fourteenth Amendment claim, holding "that the striking of all blacks from a jury panel in a particular case is not a denial of equal protection" (J.A. 17-18).

The petition for a writ of certiorari was filed on August 9, 1985. On June 2, 1986, this Court granted certiorari to determine whether the holding in *Batson v. Kentucky* should be applied to cases pending on direct appeal (J.A. 19).[2]

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[1] The jury was chosen by a "blind strike" system. *See Batson*, 106 S. Ct. at 1715 n.2. One of the blacks struck by the Commonwealth also was struck by petitioner (J.A. 12-13).

[2] In its brief in opposition (Br. Opp. 1), the Commonwealth argued that "[c]ertiorari should be denied in the case at bar since the *Batson* case will provide an adequate vehicle to consider questions relating to allegedly discriminatory exercise of peremptory challenges."

SUMMARY OF ARGUMENT

In this case, the Court must decide whether it will allow prosecutors to rely on *Swain v. Alabama*, 380 U.S. 202 (1965), to immunize discrimination that *Swain* itself condemned. This Court stated the principle of law applicable to this case in *Shea v. Louisiana*, 105 S. Ct. 1065, 1069-70 (1985), in which the Court held that a new constitutional rule must always "be applied to cases pending on direct review" except where "the rule is so clearly a break with the past that prior precedents mandate nonretroactivity." This presumption of retroactivity is mandated by considerations central to the Court's judicial function: "application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." 105 S. Ct. at 1069 (citations omitted). As the Court explained in *United States v. Johnson*, 457 U.S. 537, 551 (1982), the "clear break" exception is a narrow one which applies only when the Court "disapproves a practice [it] . . . arguably has sanctioned in prior cases." These principles require that the holding in *Batson* be applied to cases pending on direct appeal.

First, the Court's holding in *Batson* does not constitute a "clear break" in the sense of "disapprov[ing] a practice this Court arguably has sanctioned in prior cases." *Johnson*, 457 U.S. at 551. For more than 100 years, since the Court's decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court repeatedly, emphatically, and consistently has condemned the practice of discriminating

against citizens, because of their race, in the context of jury selection. This Court soundly condemned that practice in *Swain v. Alabama*, 380 U.S. 202 (1965), and reiterated that condemnation in *Batson*. Indeed, the exclusion of persons from jury service in state or federal courts, based on their race, has been a federal criminal offense since 1875. *See* 18 U.S.C. § 243 (1982).

By no stretch of the imagination, therefore, could it be asserted that *Swain* permitted what *Batson* condemns. By no stretch of the imagination could it be asserted that prosecutors were entitled, before this Court's decision in *Batson*, to discriminate against criminal defendants and veniremen because of their race. At most, the Court's holding in *Batson* merely altered the means by which a defendant may *prove* discrimination in the jury selection process. That alteration was necessary because the scheme of proof adopted by the lower courts in the years following *Swain* was inconsistent with well-established, general principles of equal protection law, as articulated in numerous decisions of this Court, and because it was ineffective as a means of enforcing the prohibition against discrimination articulated in *Strauder*, *Swain*, and other cases. *See Batson*, 106 S. Ct. at 1720-21, 1724. In *Batson*, the Court broke no ground, either in terms of substantive constitutional principle or in terms of principles of proof. At most, the Court applied well-established principles of proof to an area in which some lower courts had not done so.

Second, even if *Batson* is in some sense a "break" with past precedent, it is not the kind of break that mandates non-retroactivity. For at least four separate reasons, the integrity of the judicial process requires that the Court apply the holding in *Batson* to cases pending on direct appeal. First, as this Court's cases demonstrate, the Court has often applied the holdings of "clear break" cases to

cases pending on direct appeal, where the new rule is designed, as here, to protect the integrity of the judicial system and enhance public confidence in the impartial administration of justice. In such circumstances, the very reasons which warranted adoption of the new rule also mandate its application to pending cases. *See, e.g., Linkletter v. Walker*, 381 U.S. 618 (1965); *Ivan V. v. New York*, 407 U.S. 203 (1972). The other three considerations which compel retroactivity in a case such as this were well described by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting), and *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in part). Those considerations are consistency of principle, the need to avoid the rendering of "advisory opinions," and the fundamental judicial duty to treat similar cases in a similar way. *Desist*, 394 U.S. at 258-59. In a case such as *Batson*, where the new rule strikes at an evil close to the heart of the judicial process itself, these four considerations compel retroactivity.

ARGUMENT

I.

THE HOLDING IN *BATSON* MUST BE APPLIED TO CASES PENDING ON DIRECT APPEAL BECAUSE *BATSON* REAFFIRMS PAST PRECEDENT AND DOES NOT COME WITHIN THE "CLEAR BREAK" EXCEPTION.

In *Shea v. Louisiana*, 105 S. Ct. 1065, 1069-70 (1985), this Court concluded that, unless a constitutional rule "is so clearly a break with the past that prior precedents mandate nonretroactivity, [the] . . . new . . . rule . . . [should] be applied to cases pending on direct review when

the rule was adopted." The Court has defined a clear break case as one in which the Court "disapproves a practice [it] . . . arguably has sanctioned in prior cases." *United States v. Johnson*, 457 U.S. 537, 551 (1982).[3] In other words, the new rule must preclude the police or the prosecutor from doing something which they were constitutionally entitled to do before the decision was announced. *See, e.g., Williams v. United States*, 401 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969).

The "clear break" exception has no application here because *Batson* established no new principle of constitutional law. As the Court expressly noted in *Batson*, the Constitution has prohibited prosecutors from practicing racial discrimination in jury selection for more than 100 years (106 S. Ct. at 1719). All that *Batson* did was to

[3] In *Allen v. Hardy*, No. 85-6593 (June 30, 1986), this Court held that *Batson* does not apply to cases in which the judgment became final before *Batson* was decided. No inference is to be drawn from the summary disposition in *Allen* because the Court specifically reserved judgment "on the question whether . . . [its] decision in *Batson* should be applied to cases that were pending on direct appeal." Slip op. at 3 n.1. In any event, the holding in *Allen* is not inconsistent with our position in this case because this Court has long distinguished between cases pending on direct appeal and those on collateral attack. *Desist v. United States*, 394 U.S. 244, 260-69 (1969) (Harlan, J., dissenting); *compare Solem v. Stumes*, 465 U.S. 638 (1984), *with Shea v. Louisiana*, 105 S. Ct. 1065 (1985). Moreover, although the *Allen* Court suggested that *Batson* may in some sense be viewed as "an explicit and substantial break with prior precedent" (slip op. at 3), the Court clearly did not find that possible characterization to be dispositive because, in fact, the Court in *Allen* then proceeded to apply the three factors articulated in *Solem v. Stumes* to determine whether *Batson* should be applied to cases on collateral attack (slip op. at 4-6), an analysis which would have been wholly unnecessary if that observation had been controlling. Indeed, as we show below (*see* pages 8-14, *infra*) that observation cannot be controlling in any event because it is inconsistent with the Court's analysis in *Batson* itself.

disapprove a scheme of proof which some lower courts had developed after *Swain*, and to bring the rules of proof in this area into conformity with general principles of Fourteenth Amendment law, as articulated in numerous decisions of this Court. *Batson*, 106 S. Ct. at 1720-24. In this sense, *Batson* reaffirms existing law, and does not depart from it.

A. The Holding In *Batson* Must Be Applied To All Cases Pending On Direct Appeal Because *Batson* Reaffirmed 100 Years Of Precedent And Announced No New Substantive Constitutional Standard.

In *United States v. Johnson*, this Court explained why cases that represent "a clear break with the past" should ordinarily be given only prospective application (457 U.S. at 549-50; citations omitted): "Once the Court has found the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of nonretroactivity." For example, the Court in *Desist* (394 U.S. at 250-51) found it unfair to hold the police to the new "expectation of privacy" standard announced in *Katz v. United States*, 389 U.S. 347 (1967), when they had relied on the old "trespass" standard articulated in *Goldman v. United States*, 316 U.S. 129 (1942), and *Olmstead v. United States*, 277 U.S. 438 (1928).

In *Katz*, the Court announced a new substantive standard of constitutional law. In *Batson*, by contrast, no new substantive constitutional standard was announced. Since the ratification of the Fourteenth Amendment, this Court has consistently and steadfastly refused to sanction racial discrimination in jury selection. *Batson*, 106 S. Ct. at

1719. Indeed, few principles are more well-established in our constitutional jurisprudence. More than 100 years ago, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court held that the state violates the equal protection clause of the Fourteenth Amendment by trying a defendant before a jury from which the state has excluded blacks. As this Court explicitly recognized in *Batson* (106 S. Ct. at 1719), "[t]he principles announced in *Strauder* never have been questioned in any subsequent decision of this Court."

As it noted in *Batson* (106 S. Ct. at 1719), this Court has repeatedly reaffirmed the principles of *Strauder* and has applied them to particular facts, most significantly, for present purposes, in *Swain v. Alabama*, 380 U.S. 202, 222-24 (1965).[4] Thus, as the Court explained in *Batson*, the *Swain* Court clearly and unequivocally held that "[i]t was impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial' or to deny blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population' " (106 S. Ct. at 1720; *quoting Swain*, 380 U.S. at 224). In *Swain*, the Court also held that a defendant could establish a *prima facie* case of purposeful discrimination by showing that the state had systematically excluded blacks from juries (380 U.S. at 222-24). Finally, as Justice

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[4] As the Court noted in *Batson* (106 S. Ct. at 1719), *Swain* was not the most recent case dealing with this issue because, as the Court recognized, the constitutional issues relating to discrimination in the selection of petit juries are indistinguishable from those relating to discrimination in the selection of grand juries, and the Court, in the years since *Swain*, had decided numerous cases relating to the latter, all of which not only supported, but also mandated, the Court's holding in *Batson*. *See* pages 12-13, *infra*.

White, the author of *Swain*, observed in his concurring opinion in *Batson* (106 S. Ct. at 1725 n.*), it would not "have been inconsistent with *Swain* for the trial judge to invalidate [the prosecutor's] peremptory challenges . . . if the prosecutor . . . stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant."

In *Batson*, this Court reaffirmed that *Swain* prohibited racial discrimination in the selection of jurors, but rejected the scheme of proof which some lower courts had subsequently adopted to enforce the constitutional principles stated in *Swain* and its antecedents. *Batson*, 106 S. Ct. at 1720-25. The Court in *Batson* stated (*id.* at 1720-21; footnotes omitted):

> A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. . . . [W]e reject this evidentiary formulation as inconsistent with standards that have developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

This Court rejected the lower courts' interpretations of *Swain*, not only because those interpretations had effectively eviscerated the rights of criminal defendants to be free from racial discrimination in the exercise of peremptory challenges, but also because those interpretations of *Swain* were wrong. Although the Court conceded that *Swain* itself might have been clearer, the Court suggested that the narrow view of *Swain* adopted by some lower courts had resulted from the failure of those courts to appreciate the fundamental inconsistency between their

interpretations of *Swain* and the general principles of Fourteenth Amendment law which this Court had articulated in other cases. *Batson*, 106 S. Ct. at 1722. The *Batson* Court succinctly explained that fundamental inconsistency (106 S. Ct. at 1722; citations omitted; emphasis in original):

> Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, would be inconsistent with the promise of equal protection to all.

Accordingly, *Batson* formulated no new substantive constitutional standard. Nor did the Court in *Batson* disapprove any practice which it had previously sanctioned. At most, *Batson* disapproved some lower court rulings which misconstrued the Court's decision in *Swain* and were radically inconsistent with numerous holdings of this Court in closely analogous areas of the law.[5]

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[5] In a footnote at the close of its opinion, the Court in *Batson* suggested that "[t]o the extent that anything in *Swain v. Alabama* is contrary to the principles. . . [the Court] articulate[s] today, that decision is overruled" (106 S. Ct. at 1725 n.25; citation omitted). That footnote does not, of course, signal any intention to overrule *Swain*. Indeed, it suggests the contrary, that the Court did

(Footnote continued on following page)

B. The Holding In *Batson* Must Be Applied To Cases Pending On Direct Appeal Because It Followed Well-Established Principles of Proof Developed After *Swain*.

To the extent that *Batson* may be viewed as modifying *Swain* itself, *Batson* should not be viewed as creating new law, but as applying "settled precedents to new and different factual situations,"[6] a posture which requires application of the "new" precedent to cases pending on direct appeal. *Johnson*, 457 U.S. at 548-49.

As we have shown (*see* pages 7-11, *supra*), the *Batson* Court discussed at substantial length the general development of equal protection law in this Court's post-*Swain* cases and demonstrated that the lower courts' interpretations of *Swain* were utterly inconsistent with the general principles articulated in those cases. Of greatest significance, the Court noted that its prior decisions had clearly established the principle that " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " 106 S. Ct. at 1722 (*quoting Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14 (1977)). In addition, as the

[5] *continued*
not view *Batson* as being inconsistent in any way with *Swain* itself. All that this footnote does is to suggest to the lower courts (some of whose previous interpretations of *Swain* had been expressly disapproved in *Batson*) that they should now look principally to *Batson* as the most complete and most recent statement of the law. If the Court had wished to overrule *Swain*, it certainly would have done so explicitly. In fact, however, as the Court repeatedly recognized in *Batson*, there was no need to overrule *Swain* because the problem rested with the lower courts' interpretations of that decision, not with the decision itself.

[6] In *Batson*, the Court correctly characterized *Swain* itself as a case applying the principles announced in *Strauder* "to particular facts." 106 S. Ct. 1719 & n.13.

Court noted, it is well-established that if a party makes out "a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose" (*id.* at 1721; *citing Washington v. Davis*, 426 U.S. 229, 239-42 (1976)), the burden shifts to the state to explain the exclusion (106 S. Ct. at 1721; *citing Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

In particular, the Court noted that these principles had long been held applicable to the closely analogous area of discrimination in the selection of jury venires (106 S. Ct. at 1722; citations omitted):

> In cases involving the venire [which have been decided since *Swain*], this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination."

In addition, as the Court further explained in *Batson*, "[t]he basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries' " (106 S. Ct. at 1716 n.3; citations omitted). Significantly, the Court, in making this observation, expressly relied on its decision in *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972), a case which not only condemned discrimination in the selection of grand juries, but also adopted a scheme of proof identical to that adopted in *Batson*. That case was decided more than 14 years ago.

By applying these well-established principles of equal protection law to the area of peremptory challenges, the Court in no sense can be said to have decided *Batson* in a way that constitutes a "clear break" with past prece-

dent. *Batson* merely applied clearly established law to a new area in which its applicability not only was foreseeable, but actually was mandated by the fundamental need for uniformity in the law.

C. The Scheme Of Proof Adopted In *Batson* Is No More Burdensome For The Commonwealth Than That Adopted After *Swain*.

The Commonwealth doubtless will argue that *Batson* overruled *Swain*. As we have shown (*see* pages 7-14, *supra*), this argument misconstrues the body of precedent upon which *Batson* and *Swain* are founded. Nevertheless, the Commonwealth still cannot argue that it will be prejudiced by application of *Batson* to cases pending on direct appeal. The burden caused by such a holding cannot be unduly severe because it will require substantially the same proof that the Commonwealth would have had to adduce in order to rebut a *Swain* showing. Under *Swain*, statistical evidence suggesting a pattern or practice of discrimination did not, of course, create an irrebuttable presumption that discrimination had occurred, either in the cases constituting the statistical sample or in the case on trial (380 U.S. at 224-25). If the prosecution had valid, non-discriminatory reasons for challenging the black veniremen—either in the case on trial or in the cases comprising the statistical sample—those reasons could have been used to rebut the *Swain* showing (380 U.S. at 224-25).

In short, *Swain* itself required prosecutors to exercise their peremptory challenges based upon valid, non-discriminatory reasons. Even if *Swain* did not require that those reasons be put on the record, it certainly required those reasons to be formulated, and, given the scheme of proof mandated by *Swain* and its progeny, prosecutors surely were counselled to retain records as to the use of

their peremptories in case after case, if they wished to prevail against a *Swain*-type challenge.

If prosecutors have chosen not to retain such evidence, they have done so only because of the very ineffectiveness which the *Batson* Court perceived in the scheme of proof developed after *Swain* (106 S. Ct. at 1720-21, 1724). Thus, if prosecutors have failed to preserve such evidence, they have done so only because of the widespread perception that, under *Swain* and its progeny, such information would be more useful to defendants in making a *Swain* showing than to prosecutors in explaining their reasons for striking black jurors.

To the extent that prosecutors may now claim detrimental reliance, that claim rings hollow. The Commonwealth is without standing to argue that its own failure to formulate and record reasons for using its peremptory challenges precludes the application of *Batson* to pending cases. Prejudice cannot be established based on the fact that prosecutors may have failed to preserve the necessary information, when that failure, in turn, was based on some tactical advantage which, under *Swain* and its progeny, prosecutors perceived to exist in the non-retention of that evidence. This Court has never held such "[u]njustified 'reliance' [to be] . . . a bar to retroactivity." *Solem v. Stumes*, 465 U.S. at 646; *see also United States v. Ross*, 456 U.S. 798, 824 n.33 (1982) ("Any interest in maintaining the status quo that might be asserted by persons who may have structured their [illicit] business . . . on the basis of judicial precedents clearly would not be legitimate.").

To cause the Commonwealth now to return to the relatively small number of cases pending on direct appeal, and to explain its reasons for four or five peremptory chal-

lenges, is a minimal burden compared to that contemplated by *Swain* and its progeny—where the Commonwealth might have had to explain its use of peremptory challenges in hundreds of cases spanning many years. In many of the cases now pending on direct appeal, the issue will be easily resolved. In some cases, the point will not have been preserved at all. In others, the parties will have made a thorough public record as to the exercise of peremptories. In still others, the prosecutor will have retained non-public records in anticipation of having to meet a *Swain* showing.[7]

As a result, the administrative burden on the states will be small, particularly when compared to the benefits that will flow from retroactive application of *Batson*, in the

[7] The prosecutor's attempt in the instant case to explain *two* of his four challenges on the record (J.A. 14) suggests that parties were aware of the need for developing a record on this issue long before *Batson* was decided. The reasons are obvious. First, under *Swain*, prosecutors were clearly obligated to formulate non-discriminatory reasons for striking jurors, even if they were not required to put them on the record. Second, the bar had long recognized that certain lower court interpretations of *Swain* were out of step with general principles of Fourteenth Amendment law, a point upon which this Court specifically relied in *Batson* (*see* pages 10-14, *supra*). Indeed, since at least 1978, when the California Supreme Court decided *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), the bar has given considerable attention to the making of a proper record on the use of peremptory challenges, in anticipation of an imminent correction by this Court of the unsound principles adopted by some lower courts. In this sense, it is significant that petitioner (like most defendants whose convictions have not yet become final) was tried after this Court denied certiorari in *McCray v. New York*, 461 U.S. 961 (1983), a case in which five members of the Court specifically urged the lower courts to reconsider their interpretations of *Swain*. Most cases tried before that process of reevaluation began have long since passed beyond direct review, and, under *Allen v. Hardy*, will not be subject to a holding in this case mandating retroactive application of *Batson*. *See* page 7, note 3, *supra*.

sense of restoring public confidence in a judicial system in which all men and women stand equal before the law, regardless of race or color, to be dealt with fairly and impartially on the basis of facts, rather than prejudice. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (purpose of the jury is "to guard against the exercise of arbitrary power"); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (excluding blacks from jury service might exclude a range of human nature and experience which "may have unsuspected importance in any case that may be presented").

II.

REGARDLESS OF WHETHER *BATSON* REPRESENTS "A CLEAR BREAK FROM THE PAST," THE FAIRNESS AND INTEGRITY OF THE JUDICIAL PROCESS REQUIRES THAT THE HOLDING IN *BATSON* BE APPLIED TO CASES PENDING ON DIRECT APPEAL.

To the extent that *Batson* might be considered a "clear break" case, this Court still must apply its holding to cases pending on direct appeal, as the Court has done with other "clear break" cases, to preserve public confidence in the integrity and fairness of the judicial process. Four overriding concerns of integrity and fairness mandate that result. First, prosecutors routinely challenge black veniremen for the simple reason that prosecutors perceive that the exclusion of blacks from petit juries makes it easier to convict criminal defendants, particularly those who are black. Such invidious discrimination undermines the reliability of the verdicts pending on direct appeal, and, pursuant to this Court's precedents, requires that *Batson* be applied to cases pending on direct review. Second, fundamental constitutional rules must be applied in a consistent and predictable way to avoid manipulation of constitutional principle and to avoid waste of judicial resources. Third, the constitutional function of this

Court requires that the Court decide the cases that come before it on the merits of each case. Fourth, petitioner and other similarily situated defendants are entitled to be treated in the same way as Batson.

A. Unless *Batson* Applies To Cases Pending On Direct Appeal, Courts Will Be Forced Into Condoning Racial Discrimination Designed To Affect The Outcome Of Trials.

Even in "clear break" cases, this Court has applied newly-decided constitutional rules to cases pending on direct appeal where such application is essential to the integrity of the judicial process and to public confidence in the impartial administration of justice. For example, this Court applied *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S 25 (1949), to cases pending on direct appeal when *Mapp* was decided. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 619, 622 & n.4 (1965); *Stoner v. California*, 376 U.S. 483 (1964); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Ker v. California*, 374 U.S. 23 (1963); *see also United States v. Johnson*, 457 U.S. at 549 (*citing United States v. Peltier*, 422 U.S. 531, 547 n.5 (1975) (Brennan, J., dissenting) (*collecting* "clear break" cases)).

Although the petitioner in *Linkletter* attacked only the admissibility of evidence, and not the fairness of the trial, the Court still found it appropriate to apply *Mapp* to cases pending on direct appeal, arguably because the *Mapp* rule had been formulated to curb widespread abuse in the admission of illegally obtained evidence, which had occurred under *Wolf*, to the detriment of the integrity of the courts and public confidence in the judicial system. *Linkletter*, 381 U.S. at 629-36; *see also Tehan v. United States*, 382 U.S. 406, 409 n.3 (1966) (*applying Griffin v. California*,

380 U.S. 609 (1965), to cases on direct appeal). Similarly, the *Batson* Court perceived that the rule articulated in *Batson* was necessary, in part, because the interpretations of *Swain* adopted by some lower courts had immunized state prosecutors who chose to discriminate (106 S. Ct. at 1720-21).

The Court has found it most appropriate to give retroactive application to a new rule when it is designed, at least in part, to enhance the reliability of the trial. *Solem*, 465 U.S. at 643; *Ivan V.*, 407 U.S. at 204. Prosecutors discriminate against black veniremen for only one reason, which goes to the very heart of the judicial process: prosecutors believe that eliminating blacks from the jury panel will affect the outcome of the case and make a conviction easier to obtain, a belief which is well-founded on social science studies.[8] In effect, when prosecutors

[8] Social scientists have documented both the tendency of prosecutors to exclude blacks from juries, and the pro-prosecution effect such exclusions may have on a verdict, especially where the government's evidence is insubstantial and the defendant is black. *See, e.g.*, Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev. L. & Soc. Change 1, 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19-22; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 62 (1974); Davis & Lyles, *Black Jurors*, 30 Guild Prac. 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. U.L.Q. 415, 415-37; Ginger, *What Can Be Done to Minimize Discrimination in Jury Trials?*, 20 J. Pub. L. 427 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 175, 175-80 (1975); H. Kalven and H. Zeisel, *The American Jury* 196-98, 210-13 (1966); McGlynn,

(Footnote continued on following page)

discriminate in jury selection, they hope to benefit from invidious discrimination in the ultimate decision of the case. In effect, they hope that the truth-seeking function of the jury will be corrupted by racial prejudice. Such a decision-making process is the very antithesis of an impartial trial based on evidence. Indeed, it is the very antithesis of the central principle upon which our system of justice is built—that all men and women, rich and poor, white and black, stand equal before a color-blind, fair, and impartial system of law. Consequently, to protect the integrity of those jury verdicts which are not yet final, this Court must apply *Batson* to cases pending on direct review.[9]

[8] *continued*
Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. Psych. 93 (1976); Rhine, *The Jury: A Reflection of the Prejudices of the Community in Justice on Trial*, 41 (D. Douglas & P. Nobel, eds. 1971); R. Simon, *The Jury and the Defense of Insanity* 111 (1967); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 33-35, 154-60 (1977); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979).

[9] Because *Batson* will enhance the truth-seeking function of the criminal trial process, this case is distinguishable from cases, such as *United States v. Peltier*, 422 U.S. 531 (1975), which hold that the nature of the exclusionary rule mandates that newly decided exclusionary rule cases be given only prospective application. *See also Desist*, 394 U.S. at 250 (the exclusionary rule does not enhance the fairness of the trial). In fact, of course, the exclusionary rule frequently excludes evidence which is indeed probative and would therefore enhance, rather than detract from, the truth-seeking function of the trial. For that reason, retroactive application of any new exclusionary rule should ordinarily be denied. Far from handicapping the truth-seeking function of the trial, rules such as that stated in *Batson* clearly enhance that function by removing considerations which tend to corrupt the trial process and affect the integrity of jury verdicts, and, for that reason alone, such rules must be applied to pending cases.

The interpretations of *Swain* that were adopted by some lower courts after *Swain*, and soundly disapproved by this Court in *Batson*, effectively required that trial courts countenance racial discrimination in the selection of juries. *See Batson*, 106 S. Ct. at 1720-21, 1724. Before *Batson*, prosecutors took advantage of erroneous lower court case law, and engaged in wholesale challenges of black veniremen; they did so because they believed that the exclusion of blacks might affect the outcome of cases. *See* pages 19-20, note 8, *supra*. Because defendants ordinarily were unable to compile the statistical evidence necessary to establish long-term, systematic discrimination, trial judges often believed that they were powerless to intervene and stop discrimination which, they knew full well, was occurring in their courtrooms. These trial judges were therefore required, unwilling though they might have been, to become accessories to a practice which this Court had consistently condemned for more than 100 years. In this sense, this Court's holding in *Batson* is "remedial" because it is directed at discrimination which has been shown to exist, a threat to the integrity of the trial which must be dismantled root and branch. In these circumstances, there can be no justification for failing to apply *Batson* to cases pending on direct review, and to permit those trial judges, whose hands were previously thought to be tied, to do what the Constitution always has required them to do. *See Batson*, 106 S. Ct. at 1724.

In sum, the evidence documenting the wholesale exclusion of black veniremen is overwhelming. *See Batson*, 106 S. Ct. at 1726-27 (Marshall, J., concurring). If the exclusion of blacks from petit juries were not thought by prosecutors to affect the truth-seeking function of the jury, prosecutors would not routinely challenge blacks, and this Court's decision in *Batson* would have been unnecessary. *See Batson*, 106 S. Ct. at 1724. But this Court's decision

in *Batson* was necessary, in part because it "may have some bearing on the truthfinding function of a criminal trial" (*Allen v. Hardy*, slip op. at 4). It is hardly conceivable that prosecutors, having excluded blacks from juries *because* those prosecutors believe that exclusion affects the outcome, may now be heard to contend that the rule in *Batson* should not be applied retroactively because exclusion has no such effect.

B. Cases Such As *Batson* Must Be Applied In A Consistently Predictable Way.

The integrity of the judicial process requires this Court to apply *Batson* in cases pending on direct appeal, but due regard to this Court's constitutional function also requires that result. To guide its consideration of this issue, the Court should look, as it has in the past, to Justice Harlan's definitive analysis of these questions in *Desist* and *Mackey*. Under that analysis, overriding concerns of fairness and equity require that this Court apply *Batson* retroactively.

Justice Harlan warned that judges may be tempted to view retroactivity doctrine as a means for limiting the scope of decisions which they may consider to be controversial or even unsound. *Mackey*, 401 U.S. at 676-77. If retroactivity principles are manipulated in this way, the result is a plethora of incompatible and malleable rules wholly unrelated to principle. *Id.* The Court then becomes a legislature applying its new constitutional rules "as it deems wise." *Id.* at 677. In addition, there is a significant waste of judicial resources because this Court must issue two opinions every time it interprets or modifies constitutional doctrine: One decision explaining the doctrine, the other determining whether it applies retroactively. *See, e.g., United States v. Johnson*, 457 U.S. at 542; *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966).

In this sense, even the "clear break" doctrine is susceptible to manipulation which threatens principled decision-making. Whether a case presents a "clear break" is often a matter of degree subject to argument on both sides. Merely by characterizing a new rule as a clear break, those who question the wisdom of the new rule can undermine its effectiveness, even if, as in *Batson*, the rule is firmly rooted in well-established precedent. The precision, predictability, and efficiency inherent in the principle that new rules ordinarily should apply to cases pending on direct appeal would therefore be subverted by any principle that would require extensive debate about what constitutes a clear break. The application of the "clear break" principle must therefore be limited to cases where this Court has, unlike *Batson*, explicitly overruled past precedents which have sanctioned state conduct now deemed to be unconstitutional. Unless the clear break doctrine is so construed, the inevitable result will be the very uncertainty and inconsistency predicted by Justice Harlan.[10]

[10] Indeed, as we have previously noted (*see* page 16, note 7, *supra*), only some lower courts had adopted the interpretation of *Swain* disapproved in *Batson*. Other courts, recognizing that that interpretation was inconsistent with a vast body of Fourteenth Amendment precedent, had emphatically rejected it. Moreover, in *McCray v. New York*, 461 U.S. 961 (1983), five Justices specifically urged the lower courts to reconsider their interpretations of *Swain*. Thus, it should be obvious that *Batson* is not a "clear break" case. However, to the extent that argument can even be made on the point, that fact demonstrates the problems inherent in not restricting the "clear break" doctrine to its narrowest possible application, that is, to cases which (unlike *Batson*) have explicitly and undeniably overruled past precedents of this Court.

C. Applying *Batson* Prospectively Will Penalize Griffith And Other Defendants Whose Cases Are Pending On Direct Appeal For The Merely Fortuitous Reason That *Batson* Was The First Case The Court Decided To Review.

By necessity, this Court may announce new constitutional rules only by deciding cases over which the Court has jurisdiction. *E.g.*, *Marbury v. Madison*, 1 U.S. 267, 1 Cranch 137 (1803); *see Mackey*, 401 U.S. at 677-79 (Harlan, J., concurring in part); *Desist*, 394 U.S. at 258-59 (Harlan, J., dissenting). To facilitate this system of judicial review, the Court clearly has been afforded broad discretion over its docket. 28 U.S.C. §§ 1254, 1257, and 1258 (1982); *see Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918-19 (1950) (statement of Frankfurter, J., regarding denial of petition for writ of certiorari).

Differences in result, however, cannot be justified in any rational way if they are based on idiosyncracies arising from the certiorari process which are wholly irrelevant to the merits of a defendant's case. Suppose, for example, that petitioner had actually filed his petition for a writ of certiorari before the petition was filed in *Batson*, but that the Commonwealth had challenged petitioner's right to proceed *in forma pauperis*, and the Court had, quite properly, delayed action on the petition at bar pending the receipt of further information concerning petitioner's financial status. In the meantime, the Court doubtless would have granted Batson's petition and then decided to hold petitioner's case pending resolution of the issue in *Batson*. Or suppose that petitioner had been tried first, but that the Kentucky Supreme Court had kept petitioner's case under advisement for a longer period of time, because of other difficult questions presented for review in the case, so that Batson's case had reached this Court first. To make the granting of relief depend upon such

fortuities, in an area so central to the administration of justice, simply defies reason.

In addition, many of the cases that did not reach the Court before *Batson* was decided may well (and probably do) involve factual circumstances far more susceptible to manipulation of racial prejudice than was the case in *Batson* itself. Similarly, many of those cases may well (and probably do) involve more serious penalties, such as capital punishment, where the Eighth Amendment's heightened demand for impartial fact-finding, untainted by racial prejudice or unfairness of any kind, is manifest. *Turner v. Murray*, 106 S. Ct. 1683, 1687-88 (1986); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In view of these factors, one cannot reasonably assert that the vindication of a criminal defendant's right to have a jury selected without racial discrimination should depend upon his winning the race to the doors of this Court.

The idiosyncracies of the appellate process cannot be permitted to interfere with this Court's fulfillment of its constitutional duty. Justice Harlan put it most eloquently when he observed that "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule constitute an indefensible departure from" the most fundamental principles of judicial review. *Mackey*, 401 U.S. at 679.

D. Defendants In The Same Situation As Batson Must Be Treated In The Same Way.

This Court, like any other, must grant similarly situated defendants "the same relief or give a principled reason for acting differently." *Desist*, 394 U.S. at 258 (Harlan,

J., dissenting). The tradition of the common law, and adherence to the rule of law, demands no less. *Id.* Regardless of whether *Batson* was a clear break from *Swain*, defendants whose cases were pending on direct review when *Batson* was decided must be afforded the same remedy that Batson received. *Batson* and its antecedents recognize a personal constitutional right in each defendant to be free from racial discrimination in the prosecution of his individual case. To grant redress for the violation of that right in Batson's case, while denying it to all others similarly situated, is therefore inconsistent with *Batson* itself.

The fortuities of the judicial process cannot be allowed to determine which defendants obtain relief from the same fundamental wrong. The central meaning of the Equal Protection Clause is "that those who are similarly situated be similarly treated." Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949). If the Court provides a remedy for a fundamental violation of equal protection, such as that recognized in *Batson*, this Court must administer that rule in a spirit consistent with its basic purpose. The chronological details of petitioner's appeal have nothing to do with whether he suffered the discrimination condemned in *Strauder*, *Swain*, and *Batson*, and those details should have nothing to do with whether he is entitled to relief. *See United States v. Johnson*, 457 U.S. at 555 n.16.

As Justice Harlan said, "a proper perception of [this Court's] . . . duties as a court of law, charged with applying the Constitution to resolve every legal dispute within [the Court's] . . . jurisdiction on direct review, mandates that . . . [the Court] apply the law as it is at the time, not as it once was." *Mackey*, 401 U.S. at 681 (Harlan, J., concurring in part).

CONCLUSION

The judgment of the Supreme Court of Kentucky should be vacated and the case remanded for consideration in light of *Batson v. Kentucky*.

Respectfully submitted,

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